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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

GABRIEL JASON CAVAZOS,

Defendant and Appellant.

A124274

(San Mateo County  
Super. Ct. No. SC067420)

**I.**

**INTRODUCTION**

A jury convicted appellant Gabriel Cavazos of several offenses committed against Jane Doe, his former girlfriend: stalking (Pen. Code, § 646.9, subd. (a))<sup>1</sup>; misdemeanor battery (§ 243, subd. (e)(1)), and violating a restraining order (§ 273.6, subd. (a)). However, the jury acquitted appellant of the more serious charges, including rape (§ 261, subd. (a)(2)), kidnapping (§ 207, subd. (a)), false imprisonment (§ 236), illegal videotaping (§ 647, subd. (k)(3)), and vandalism (§ 594, subd. (b)(2)(A)).

In this appeal appellant claims his trial was rendered unfair when the trial court ordered a deputy to follow him to the witness stand and sit between him and the jury while he testified. We reject appellant's contention that his right to a fair trial was violated by this security measure. Our decision is consistent with our Supreme Court's recent holding in *People v. Stevens* (2009) 47 Cal.4th 625 (*Stevens*). Appellant also

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<sup>1</sup> All further undesignated statutory references are to the Penal Code.

contends that the trial court abused its discretion when it permitted the prosecution to use a series of text messages sent by appellant in rebuttal, arguing that this evidence should have been part of the prosecution's case-in-chief. On this record, we find no abuse of discretion in permitting the rebuttal evidence. Consequently, we affirm.

## **II.**

### **FACTS AND PROCEDURAL HISTORY**

Jane Doe was the complaining witness and the prosecution's chief witness at trial. She testified that she met appellant in late 2006 when she went to a Redwood City Metro PCS store to purchase a cell phone. Appellant was an employee at the store, although he was not the employee who sold her the phone. Shortly after she purchased the phone, she began receiving calls from appellant, purportedly to see if there were any problems with her new phone. This surprised Jane Doe as she had not given appellant her cell phone number, and she had not invited him to contact her.

Appellant repeatedly called Jane Doe to ask her out. Initially, she declined, but later she agreed to go out with appellant. After a number of dates, appellant and Jane Doe became sexually intimate and began to see one another more regularly. Early on in their relationship, Jane Doe noticed appellant's personality changing. He was becoming more possessive of her, showing up unannounced, and sometimes taking her keys and cell phone.

In approximately March 2007, Jane Doe informed appellant that she did not want to continue their relationship. Although Jane Doe made her intentions clear, appellant continued to pursue her. He called her constantly, made threats to her and her family, and came to her apartment uninvited. On one of these occasions, Jane Doe testified that appellant showed her three videos recorded on his cell phone of the two of them having consensual sex. Appellant told Jane Doe that he had saved copies of these videos on his computer. He threatened to post the videos on the Internet or to show them to her family if she did not do what he said. Jane Doe testified she got on her knees and begged appellant to erase the videos. Appellant laughed at her, and then forced her to have sexual intercourse against her will.

Jane Doe testified that appellant continued to threaten and terrorize her. She recounted an incident where he hit her in the face and choked her after he observed her dancing with another man at a club. He used the videos as a means of getting her to agree to meet with him. On one occasion, he told her he would erase the videos if she met him at a shopping center parking lot. Once there, he insisted that in order for him to erase the videos, she had to get into the passenger seat of his truck. When she did so, appellant “locked the doors and he took off.” He attempted to rape her, but she was able to escape.

Jane Doe testified that appellant sexually assaulted her on at least three occasions, often luring her to a location by telling her that he would erase the videos, and then sexually assaulting her instead. In addition, appellant took Jane Doe’s cell phone saying that he was going to get all the information from it. Jane Doe had a suspicion that appellant had tampered with her cell phone. She testified “[h]e would get into my voicemail and change my voice message to his.” She reported her suspicions to appellant’s supervisor at Metro PCS, and appellant’s employment was terminated.

In September 2007 Jane Doe went to the police and reported that appellant was making harassing phone calls. In November 2007, she obtained a restraining order against appellant. Jane Doe did not, however, report any rape, kidnap, or false imprisonment to the police at that time. She waited until May 2008 to first report these incidents.

Following service of the restraining order, which prohibited any contact with Jane Doe, appellant continued to call her on numerous occasions and left voice mail messages. The voice mail messages were played for the jury. In one of the messages, appellant admitted that he slapped Jane Doe.<sup>2</sup>

Appellant testified on his own behalf. He admitted his relationship with Jane Doe was plagued by “constant break-ups” because of “[j]ealousy on both parts.” He admitted

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<sup>2</sup> He told her, “I fuckin’ slapped you because you’re a ho’, bitch! So all this little bullshit, you better change your little words and say the fucking truth . . . .”

fighting with Jane Doe over a text message she had received from another man; and he acknowledged that he had slapped her. He also acknowledged that he had violated the restraining order several times by leaving angry, profanity-laced messages on Jane Doe's voice mail. He admitted "making a threat" to "fuck [her] up" after he was served with the restraining order. He explained that he was angry because Jane Doe had lied in the restraining order application. Appellant denied videotaping, kidnapping, or raping Jane Doe.

The trial obviously turned on Jane Doe's credibility. Her credibility was severely damaged by the testimony of Elizabeth Aparicio, who testified under subpoena. Ms. Aparicio indicated that she had been friends with Jane Doe since 2001. Ms. Aparicio was aware that Jane Doe was dating appellant and that their relationship was rocky. Jane Doe told Ms. Aparicio about the incident where appellant had slapped her. However, Ms. Aparicio testified that she first learned of the rape and kidnapping allegations when she was interviewed by an investigator in late 2008. She was "quite surprised" by the allegations, and she asked Jane Doe about them. Jane Doe explained that appellant was "bothering her quite a lot" and she believed that the "only thing that was left for her to do was to say that he raped her so that he [would] leave her alone."

As noted, the jury found appellant not guilty of the more serious charges including rape, kidnapping, false imprisonment, illegal videotaping, and vandalism, but it found him guilty of stalking; misdemeanor battery, and violating a restraining order. On March 6, 2009, the court sentenced appellant to state prison for the two-year midterm on the stalking conviction, and to concurrent county jail terms of 237 days on the remaining counts. The court struck a prior prison term enhancement pursuant to section 1385. Appellant filed a notice of appeal on March 9, 2009.

### **III.**

#### **DISCUSSION**

##### **A. Courtroom Security**

Appellant claims that the trial court abused its discretion by positioning a deputy sheriff between appellant and the jurors during appellant's testimony. Appellant

emphasizes that no other witness was followed or guarded by a deputy during his or her testimony. Appellant's attorney objected to this procedure on the grounds that it would prejudice appellant by making him appear dangerous to the jury. He also noted that appellant had sat quietly through the entire trial, and "[t]here's been no mention of any security issues or anything of that nature."

Following the trial in this case, the California Supreme Court issued its opinion in *Stevens, supra*, 47 Cal.4th 625, holding that the court's decision to place a deputy near a testifying defendant is not akin to a "human shackle" and that such a security measure "is not an inherently prejudicial practice that must be justified by a showing of manifest need." (*Id.* at p. 629; see also pp. 634-637.) The court explained that "so long as the deputy maintains a respectful distance from the defendant and does not behave in a manner that distracts from, or appears to comment on, the defendant's testimony, a court's decision to permit a deputy's presence near the defendant at the witness stand is consistent with the decorum of courtroom proceedings." (*Id.* at p. 639, fn. omitted.)

*Stevens* held that the decision to station a deputy next to the defendant while testifying is subject to the deferential abuse of discretion standard on appeal. (*Stevens, supra*, 47 Cal.4th at pp. 637.) However, in exercising its discretion, the court should "not defer decisionmaking authority to law enforcement officers, but must exercise its own discretion to determine whether a given security measure is appropriate on a case-by-case basis. [Citations.]" (*Id.* at p. 642.) Ideally, the court should offer an explanation on the record why the need for this security measure outweighs potential prejudice to the testifying defendant. (*Ibid.*)

In the present case, the court justified this security measure as follows: "We're in a relatively small confined courtroom. I have a limited amount of space. We have twelve jurors and two alternates sitting right now in the jury box. It's my practice when the defendant is in custody charged with a felony, to have the transportation deputy somewhere in proximity to the defendant which generally means sitting, not directly next to him, but up sort of between him and the jury. It's a security measure that has been done for years." The court explained that, "there is no way for a deputy sheriff to provide

adequate security for a defendant when they're standing . . . about 22 feet from where the deputy would normally be and the witness stand. So it would be a problem because that deputy sheriff, if something was to occur, would have to navigate around counsel table, the jury box, the court reporter's table, the witness stand."

Although the lower court's ruling on the security measures for appellant's trial antedated the *Stevens* decision, the trial judge nevertheless articulated findings justifying the special security needs of this particular case as *Stevens* requires. Here, the trial court concluded that, due to the size of the courtroom and the obstacles between the deputy and the witness stand, security concerns compelled the presence of a deputy at the front of the courtroom between appellant and the jury. At the time the court made its ruling, appellant was charged with rape and kidnapping which are serious, violent offenses that carried severe potential sentences. The victim, whom appellant had acknowledged slapping and threatening with violence, would presumably be in the courtroom when he testified. The court observed that the deputy "won't be sitting as close as the interpreter sits . . . but it is the least restrictive means in a circumstance such as this. And only appropriate for security." As in *Stevens*, "these observations indicate the trial court exercised its own judgment, on a case-specific basis, when it ordered a deputy to be stationed near the witness stand. The court weighed the matter and concluded the procedure was appropriate under the circumstances." (*Stevens, supra*, 47 Cal.4th at p. 643.)

In any event, by its verdict in this case, the jury demonstrated that the security measures did not undermine its ability to be impartial. (*Stevens, supra*, 47 Cal.4th at p. 629 [defendant must show "actual" as opposed to presumed prejudice].) As noted, the jury acquitted appellant of the most serious charges he was facing and, instead, selected those crimes for conviction that were supported by appellant's own trial testimony and his recorded cell phone messages. Given the jury's verdict, we can confidently say that the security measures imposed by the trial court did not generate any unfair prejudice to appellant.

## **B. Improper Rebuttal Evidence**

Appellant next claims that the trial court abused its discretion in allowing the prosecution to introduce evidence to establish that appellant tampered with Jane Doe's cell phone. This evidence was admitted, over appellant's objection, in rebuttal to appellant's testimony that any changes that were made to Jane Doe's Metro PCS account were done at her request. He explained that he contacted someone at Metro PCS in October or November 2007 to change Jane Doe's voicemail account, "per Jane Doe's issues."

In rebuttal, Jane Doe testified she never authorized appellant to access her Metro PCS account. She testified that appellant had tampered with her phone, changing the voicemail password and erasing her messages. She complained to Metro PCS about appellant's conduct, and his employment relationship with them was severed.

Over appellant's objection, the trial court allowed the prosecutor to introduce a series of text messages that appellant had sent to Anthony Alfonso, another Metro PCS employee. The first message, sent at 3:23 p.m. on November 4, 2007, was simply Jane Doe's cell phone number. The second message, sent at 4:25 p.m., asked, "What happened, Anthony?" The third message, sent three minutes later was, "Please Ant, you are my only savior. Please call me back." The fourth message was sent about 45 minutes later, "It's hella quick. I don't want that bitch to win in court."

In claiming that the admission of these text messages was error, appellant argues that "[t]he trial court deprived appellant of a fair trial by . . . allowing the prosecution to introduce improper and highly prejudicial rebuttal evidence." In making this argument, appellant principally relies upon *People v. Carter* (1957) 48 Cal.2d 737. In that case, our Supreme Court stated "proper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt. [Citations.]" (*Id.* at pp. 753-754.) Restrictions are imposed on rebuttal evidence to: (1) ensure the presentation of evidence is orderly and to avoid juror

confusion; (2) prevent the prosecution from unduly emphasizing the importance of certain evidence by introducing it at the end of the trial; and (3) avoid “unfair surprise” to the defendant from confrontation with crucial evidence late in the trial. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1211.)

“ ‘The decision to admit rebuttal evidence over an objection of untimeliness rests largely within the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of that discretion.’ [Citation.]” (*People v. Mayfield* (1997) 14 Cal.4th 668, 761; accord, *People v. DeSantis* (1992) 2 Cal.4th 1198, 1232.)

We find no abuse of discretion in this case. Numerous cases have approved the introduction of rebuttal evidence where, as in the case at bench, rebuttal testimony repeats or fortifies a part of the prosecution’s case-in-chief which has been attacked by defense evidence. (See *People v. Young* (2005) 34 Cal.4th 1149, 1199; *People v. Whitehorn* (1963) 60 Cal.2d 256, 263; *People v. Avery* (1950) 35 Cal.2d 487, 491-492.)

Here, the recitation of appellant’s text messages, which seemed to implore another Metro PCS employee to cover up the fact that appellant had tampered with Jane Doe’s cell phone account, rebutted appellant’s assertion that he only accessed Jane Doe’s Metro PCS account because she asked him to do so. Consequently, this evidence was proper rebuttal; and appellant has failed to show it was an abuse of discretion for the court to admit it, particularly in light of the careful consideration the trial court gave to the issue before admitting the testimony.

Moreover, the text message evidence was clearly insignificant when compared to the other evidence establishing appellant’s guilt of stalking, battery, and violating a restraining order. Jane Doe’s testimony establishing these offenses was corroborated by the recordings of appellant’s cell phone messages, and appellant’s admission that he slapped her, repeatedly called her in violation of the restraining order, and threatened to harm her. Accordingly, there is nothing in this record to indicate the prosecutor intentionally withheld crucial evidence more appropriately presented in its case-in-chief in an effort to give that evidence greater emphasis “by dramatically introducing it late in



the trial . . . .” (*People v. Carter, supra*, 48 Cal.2d at pp. 753-754.) On this record, we find no abuse of discretion in permitting the rebuttal testimony.

**IV.**

**DISPOSITION**

The judgment is affirmed.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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RIVERA, J.